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A PLEA FROM SCOTLAND: PRESERVING ACCESS TO COURTS IN PRIVATE LAW CHILD CONTACT DISPUTES

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This paper is set against the background that legal aid for family actions has recently been removed in England and Wales in almost all instances except where there is recent evidence of domestic or child abuse, and against the background that the handling of family cases is also under review in Scotland. The author presents findings from her recent Scottish court-based research which illustrate the importance of access to the courts for parents who have welfare concerns for their child when in the care of the other parent - even though these concerns may not generate documentary evidence in advance of court action. Rather the court action itself provides the opportunity for investigations into all the circumstances of the child, including the child's views on contact, often leading to evidence of abuse becoming available. Courts are also unique in enabling protective orders to be put in place and the limiting of the exercise of parental rights - without which brute force alone might determine contact outcomes. The article therefore concludes that blocking access to the courts by the removal of legal aid will mean increasing numbers of children are forced into contact that distresses them. The article includes a consideration of the pre-existing differences in the processing of child contact disputes in England and Wales and in Scotland which may, in part, underpin the pronounced differences in the response to the need for family justice reform in the two jurisdictions.

KEYWORDS: child contact; access to justice; legal aid; domestic abuse; views of the child.

INTRODUCTION

It was in the wake of the global financial crisis evident from 2007, that the newly elected UK Coalition Government of 2010 published its Programme for Government.¹ This included the commitment to 'carry out a fundamental review of Legal Aid to make it work more efficiently,'² and to 'increase the use of mediation when couples break up.'³ The UK Government asserted in the consultation process on the reform of legal aid which followed that:

'it is not the case that everyone is entitled to legal representation, funded by the taxpayer, for any dispute or to a particular outcome in litigation.'⁴

The changes flowing from the UK Government's programme of legal aid reform in England and Wales were intended to deliver a saving of £350 million by 2014-2015 from the pre-existing spend of £2 billion on legal aid.⁵ Further cuts of an extra £220 million by 2018-2019 are being consulted on at the time of writing.⁶

Scotland's overall budget was also cut as a result of the UK Government's Comprehensive Spending Review in 2010, resulting in the Scottish Government seeking to reduce her legal aid budget from £161.4 million in 2010-2011 to £132.1 million for 2014-2015.⁷ Family cases in both jurisdictions came in for particular attention as part of the reviews into the funding of the

¹ HM Government, *The Coalition: Our Programme for Government* (Cabinet Office, May 2010).

² HM Government, *The Coalition: Our Programme for Government* (Cabinet Office, May 2010), at p 23.

³ *Ibid*, p 20.

⁴ MoJ, *Reform of legal aid in England and Wales: the Government Response* (TSO, 2011), at para 72.

⁵ *Ibid*, para 12.

⁶ MoJ, *Transforming legal aid: delivering a more credible and efficient service* (TSO, 2013), at p 5.

⁷ Scottish Government, *A sustainable future for legal aid* (2011) Table 1. Note: Scotland's population is 9% that of England and Wales combined.

civil justice systems as they account for around half of all civil legal aid expenditure.⁸ It is also the case that, unlike most other types of actions, costs cannot be recouped from parties when the dispute is over children as there is no monetary gain to either party from which to claw back the costs to the state.

One of the earliest changes made to the provision of legal services in family cases in England and Wales came into force from April 2011. It was then that it became compulsory for any couple considering applying for an order in the family courts, to attend a “Mediation Information and Assessment Meeting” (MIAM) to learn about family mediation and other forms of alternative dispute resolution.⁹ Previously it was the case that only those requiring legal aid to raise a court action were prevented from doing so without first attending a meeting with a mediator.¹⁰

However, as many will be aware, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), which has been in force since April 2013, introduced far more drastic changes to the provision of legal services in England and Wales. In disputes over child contact, it is now not possible for an individual to obtain legal aid for advice from lawyers, let alone representation in a court of law, unless theirs is either determined to be an “exceptional” case under section 10 of the act,¹¹ or they can provide specified, recent, evidence of domestic or child abuse, or wish to prevent the unlawful removal of their child from the UK or within the UK.¹²

There is no suggestion of Scotland following a similar path. Rather, the Scottish Government has stated that:

‘The Government’s view remains that wholesale reductions to scope [in legal aid] can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society.’¹³

A similar view was also expressed by Sheriff Principal Taylor who, when appointed to undertake a review of the funding of civil litigation in Scotland in March 2011, observed that:

‘Access to justice is a right and it has been said with some force that its absence is “an enemy of the rule of law.”’¹⁴

⁸ For England and Wales: MoJ, *Family Justice Review: Final Report* (November 2011). For Scotland: Sheriff Principal James Taylor, *Review of expenses and funding of civil litigation in Scotland: consultation paper* (November 2011).

⁹ Family Procedures Rules 2010 (SI 2010/2955) Practice Direction 3A Pre application protocol for Mediation information and assessment.

¹⁰ Family Law Act 1996, s 29 (3F) amending Legal Aid Act 1988, s 15.

¹¹ The rules pertaining to such an application are contained in the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), s 66- 69; while the guidance on applications is to be found at: Lord Chancellor’s Exceptional funding guidance. Available at: <http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf> (last downloaded 07.06.13).

¹² Legal Aid, Sentencing and Punishment of Offenders Act 2012, Sch. I, Part I, s 12, victims of domestic violence fall within scope for legal services for specified action types; while under Sch. I, Part I, s 13, children at risk of abuse fall within scope for legal services for specified action types; and Sch I, Part I, s 10, a party can obtain legal services to prevent the unlawful removal of a related child or secure the return of a related child.

¹³ Scottish Government, *A sustainable future for legal aid* (2011), para 19.

¹⁴ Sheriff Principal Taylor, *Review of expenses and funding of civil litigation in Scotland. Press statement*. Available at: <http://www.scotland.gov.uk/About/Review/taylor-review/ConsultationPaper/press-statement> (last accessed on 04.05.13) His final report was not available at the time of writing.

Nor is the Scottish Government contemplating substituting access to the courts with family mediation, as it remains of the view that mediation complements, but is not a complete alternative to, the work of the courts.¹⁵

Instead, in Scotland, a number of disparate measures have been introduced, in stages, to reduce expenditure on civil legal aid. The brunt of many of the measures has been borne by legal practitioners (such as reductions in fees and the introduction of a fee schedule for counsel) rather than limiting the scope of who may be legally aided. However, actions for interim residence or contact as well as for interim interdicts (such as against removal of a child)¹⁶ were removed from the scope of the work solicitors may undertake as a matter of special urgency.¹⁷ This means it is necessary for a client to provide evidence of his or her income *before* an action of special urgency may be raised in court, rather than it being possible to provide evidence of income later in the process. It is also now the case that the income of those seeking advice from solicitors in Scotland is assessed over a longer period of time and any capital they may have is taken into account in the eligibility assessment which, when a party is no longer living in their family home, may include their interest in the family home.

Although these changes are minor compared to those introduced by LASPO into England and Wales, they have had an impact on litigants leaving abusive relationships as those fleeing abuse may not have the necessary paperwork with them to prove their income and, any capital they have in the family home they have actually fled from, may prevent them being eligible for legal aid. Anecdotally the author has also been informed by practitioners that applications to the Scottish legal aid board which they believe would have been granted prior to the changes, are currently often being rejected on merits grounds (reasonableness and probable cause) but then granted on appeal – introducing delay and additional stress into the process.¹⁸

The exceptional but high profile Scottish child contact case of *NJDB v JEG* which cost £1 million and lasted over nine years has also fuelled changes in the management of cases by the courts in Scotland through the alteration of the rules of court so that any proof hearing focuses only on the key issues in dispute.¹⁹ Consideration is also currently being given to the introduction of a third tier of judges to hear the majority of family cases and who will presumably be less highly remunerated than the sheriffs who currently hear these cases.²⁰

All these developments make it timely to consider what the role of the court actually is in the resolution of disputes over child contact and residence. This paper draws on findings from the author's Scottish court-based 'Listening to Children' study which illustrate the complex welfare concerns existing in the majority of cases that go before the courts and the unique ways

¹⁵ Scottish Government. *Making justice work. Courts Reform (Scotland) Bill: a consultation paper* (2013), para 165.

¹⁶ The Scottish equivalent of a prohibited steps order.

¹⁷ Under amendments to Regulation 18(2) Civil Legal Aid (Scotland) Regulations 2002, in force from February 2011. However solicitors are still able to seek the prior certification of the Scottish Legal Aid Board, in appropriate circumstances, under regulation 18(1)(b).

¹⁸ The author is grateful for the insights provided by practitioners on this point. Future research on the impact of the changes to legal aid provision is needed to determine how widespread this impact has been across different action types.

¹⁹ *NJDB v JEG* [UKSC] 21. The changes were introduced by The Rules, Act of Sederunt (Sheriff Court Rules) (Miscellaneous Amendments) (n.2) 2013 which inserted s 33AA into the Act (in force from 03.06.13) and applies when a case is proceeding to proof. Specifically, the rule introduces the requirement for a pre-proof case management hearing, which must itself be preceded by a pre-hearing conference at which the parties must discuss settlement of the action. The parties do not have to be physically present but must be contactable by their legal representative at the time of the meeting.

²⁰ Scottish Government. *Making Justice Work. Courts Reform (Scotland) Bill: a consultation paper* (2013), at p 15.

in which the court is able to ensure the protection of the children within those families. This not only sheds light on the likely grim impact of LASPO on children and their parents in England and Wales but also on the existing features of court process in Scotland which need to be preserved and strengthened.

The author's doctoral 'Listening to Children' project, funded by the Economic and Social Research Council, involved the collation of data from the court papers of 208 child contact disputes between parents (concerning 299 children).²¹ The overarching aim of the project was to ascertain whether the methods for taking children's views, and the treatment of those views once taken, was consistent with the promotion of the child's welfare. Data was collated on the nature of the disputes between the parents, as well as the extent to which children were heard, the views they expressed and the weight attached to their views. Additionally, data on the legal aid status of the parents, the presence or absence of allegations of domestic, child or substance abuse, and the contact outcome of the case was collated.²²

Half the cases in the 'Listening to Children' project involved allegations of domestic abuse. However, a significant percentage of the parties alleging domestic abuse (around 42%), did not actually have evidence of the kind required by courts in England and Wales under LASPO at the time their case was lodged with the court. Rather, it was investigations undertaken as *part of* the court process that often resulted in evidence of abusive behaviour coming to light. Furthermore, as courts (unlike mediators) are under a duty to take the views of children who are capable of formulating a view and express a wish to be heard,²³ more than half the children aged seven and over had their views put before the court in this Scottish study. These children often described abusive behaviours during contact of a type unlikely to produce the evidence currently required for lodging an action in court in England and Wales under LASPO but which clearly distressed them. Yet, without the raising of the court action, these children's views would not have had the same potential to have an impact on the contact outcome, as only courts have ultimate authority to regulate the exercise of parental rights.

This paper proceeds by outlining the extent to which parents went to court over contact prior to the recent reforms, as well as the highly conflicted nature of those cases going before the courts. This is followed by a brief description of the substantive law pertaining to the resolution of contact disputes by the courts, as well as a description of the pre-existing differences in the *processing* of these cases in England and Wales and in Scotland. It is suggested that these differences in the processing of cases pre-disposed the family justice system of England and Wales to the removal of legal aid for family actions unless there is evidence of abuse.

Thereafter the paper unpacks the protective capacities of the courts by using the treatment of the cases in the 'Listening to Children' study within the Scottish court system as the focus. The key protective capacities identified are protective orders, investigative welfare reports, the taking of the views of the child and the power to limit the exercise of parental rights. From this discussion, the author concludes that the removal of legal aid for family actions except where recent specified evidence of abuse exists, will, ironically, fail to protect many victims of abuse - including children.

CHILD CONTACT DISPUTES IN BRITAIN

²¹ See the section of this paper headed 'The 'Listening to Children study: a note on methodology' for more information on the selection of cases.

²² The full findings and methodology are available in K Mackay, *The child's voice in contact disputes: genuine participation in private law court actions* (Lambert Academic Publishing, 2012).

²³ United Nations Convention on the Rights of the Child, Art 12:2 and Children (Scotland) Act 1995, s 11(7)(b).

Just over a quarter of all families with dependent children in Britain are headed by a lone parent, usually the children's mother.²⁴ Around 2% to 3% of children are affected by the separation of their parents in any one year,²⁵ and potentially the number of children who may be caught up in a dispute over who they are to live with (residence) or the amount of time they spend with the parent they no longer live with (contact) is substantial.

However, even prior to the reforms to the family justice systems, the majority of contact arrangements were not court imposed. In England and Wales, around 10% of parents state their contact arrangement was court ordered, although a greater percentage are likely to have raised a court action that did not then go on to the stage of a final order.²⁶ In Scotland a somewhat lower figure of 5% of parental couples who live apart state they have ever been to court over contact.²⁷ Notably, in Scotland it is possible for parents to enter legally binding agreements outwith court procedure in the form of a Minute of Agreement and these may include agreement over contact arrangements and child support payments.²⁸

Although most parents do not actually *choose* to go court, we know they value advice from legal practitioners in this context as, where not prevented from doing so, over 80% of individuals with a dispute associated with separation and divorce are estimated to speak with a solicitor.²⁹ This advice may assist them to reach agreement by enabling them to learn what their rights and responsibilities in law are, and the likely outcome if they are to raise an action in court. In this way access to advice from qualified legal practitioners can assist in dispute resolution. In Scotland, only 9% of those seeking advice from a legal aid solicitor in respect of child contact actually go on to obtain legal aid for representation in a dispute over contact.³⁰

Given the impact of caring for children on the capacity to earn, it is not surprising that some of those seeking legal advice need to rely on state funds to pay for the advice in the form of legal aid – especially in the context of lone parenthood post separation. They may also be reliant on state support in order to raise or defend an action concerning the welfare of their child. In the 'Listening to Children' study court cases, three-quarters of female pursuers were in receipt of legal aid and just over two-thirds of male pursuers were in receipt of legal aid; with both parties being in receipt of legal aid in 56% of cases.³¹

²⁴ Office of National Statistics. *Lone Parents with dependent children* (2012), p 1. Available at <http://www.ons.gov.uk/ons/rel/family-demography/families-and-households/2011/sum-lone-parents.html> (last accessed on 03.06.2013). Scottish Government, *Growing up in Scotland: Sweep 3 Non-resident Parent Report* (2009) Available at: www.scotland.gov.uk/Resource/Doc/257706/0076466.pfd (last accessed 04.05.13).

²⁵ Scottish Government. *Growing up in Scotland Sweep 3: Non-resident parent report* (2009), p 5. Two cohorts of children were included in this research (aged around 2 years 10 months and 4 years 10 months).

²⁶ D Lader, *Non-resident parental contact, 2007- 2008* (Office for National Statistics, 2008). The author is grateful for comments by an anonymous reviewer on this point.

²⁷ Scottish Government, *Growing up in Scotland Sweep 3: Non-resident parent report* (2009), at para 4.2.

²⁸ See Scottish Government, *Child Contact Survey 2007* (Scottish Government Social Research / Scottish Government Justice Directorate, 2008), para 4.45 which reports 8% of resident parents and 10% of non-resident parents said they had recorded the contact arrangement in written form to be made legally binding. See also J Mair, F Wasoff and K Mackay, *All settled? A study of legally binding separation agreements and private ordering in Scotland: Final Report* (Centre for Research on Families and Relationships, 2013).

²⁹ H Genn, *Paths to Justice: what people do and think about going to law* (Hart, 1999), p 115; H Genn and A Patterson *Paths to Justice Scotland: what people do and think about going to law* (Hart, 2001), p 125.

³⁰ Scottish Legal Aid Board, *Monitoring of availability and accessibility of legal services: first report*.

(undated), p 27, Table 6. Available at:

http://www.slab.org.uk/export/sites/default/common/documents/about_us/whatwedo/2012_Final_Monitoring_Report.pdf (last accessed on 06.05.13).

³¹ For England and Wales see: R Moorhead and M Sefton, *Litigants in person: unrepresented litigants in first instance proceedings* (DCA, 2004), at p 62: Table 22.

It is sometimes assumed that the availability of legal aid has ‘has encouraged people to bring their problems to court,’³² and that it may give them an ‘unfair advantage’ over non-legally aided litigants.³³ However low parental income is also often just one of a cluster of problems with implications for a child’s welfare and it is known that those cases which *do* proceed to court often include allegations of substance abuse, domestic abuse and criminal convictions, in addition to unemployment.³⁴ There may also be many families where serious welfare concerns are present that are never brought to the attention of the courts.³⁵

Notably, women are most usually defenders in child contact cases, responding to an action that has been raised against them in 73% of cases. In the ‘Listening to Children’ study, 73% of women who alleged domestic abuse were in receipt of legal aid, a significantly higher proportion than women who did not make such allegations (50% of whom were in receipt of legal aid).³⁶ Given the background to so many of the cases coming before the courts, this financial assistance is clearly vital and cuts in legal services provision may disproportionately impact on victims of domestic abuse in England and Wales when they do not have the necessary evidence of the type required under LASPO.

THE ‘LISTENING TO CHILDREN’ STUDY: A NOTE ON METHODOLOGY

The court data set for the author’s ‘Listening to Children’ study which is drawn on in this article is comprised of child contact disputes between parents which were no longer active at the time of data collection and were raised in two sheriff courts over the one calendar year (2007). Over the 12 week data collection period it was possible to include *all* cases fitting this criteria that had been raised in Court A (82 cases) and all cases fitting this criteria that were raised between 1st January – 14th September in 2007 in Court B (126 cases). A total of 208 cases concerning 299 children.

In Scotland an estimated 1,600 disputes over contact or residence are raised over the course of a year across 49 sheriff courts.³⁷ Data for the study was collected from two sheriff courts located in different parts of Scotland to increase the number of cases that could form the basis of the study and also because it may be that practice varies between courts. Both courts were busy urban courts within a feasible commute from the author’s home.

The year 2007 was selected as the year of study as this was after the statutory requirement on courts to take account of the need to protect a child from abuse when deciding contact arrangements was introduced in Scotland in May 2006.³⁸ As the data was collected in 2009, this also gave a sufficient lapse of time for there to have been a resolution of the dispute in most cases, thus avoiding the problem of court papers still being in use and generally not

³² MoJ, *Reform of legal aid in England and Wales: the Government response*. Cm 8072 (2011), at p 7.

³³ Scottish Government, *A sustainable future for legal aid*, (2011), at p 6.

³⁴ J Hunt and A Macleod, *Outcomes of applications to court for contact orders* (MoJ 2008) whose review of court actions found allegations of domestic abuse in 34% of cases, child protection issues in 23% of cases, alcohol abuse in 21% of cases, drug abuse in 20%, mental illness in 13% of cases and fear of abduction in 15% of cases. See also: L Trinder J Connelly J Kellet C Notley, *A profile of applicants and respondents in contact cases in Essex* (DCA, 2005) who found 53% of women said abuse had led to the separation.

³⁵ V Peacey and J Hunt, *I’m not saying it was easy ...contact problems in separated families* (Gingerbread 2009) found that half the women reporting domestic abuse, child abuse or neglect and substance abuse or mental illness had not actually taken their case to court often because they thought the courts would be biased or ineffective.

³⁶ In Scotland, in 2007 (the year the actions in the data set were lodged) a litigant with a disposable income above £10,306 did not qualify for Civil Legal Aid. Since then the threshold had been raised in Scotland and it is also higher in England and Wales so that an even greater percentage of potential litigants would qualify on the basis of income level.

³⁷ Scottish Government (2012) Civil law statistics 2011-2012. Edinburgh. Table 9.

³⁸ Family Law (Scotland) Act 2006, s24 amending Children (Scotland) Act 1995, s11 (7).

available for research purposes. In this way, both cases that resolved rapidly and cases that took longer to reach resolution (perhaps because of more complex welfare concerns) were included.

Data in respect of each child was initially entered onto a data collection sheet and later coded and entered onto a computer for analysis using Predictive Analytics Software (PASW) for analysis.³⁹ Data was entered at child level (rather than case level) as the views a child expresses and the contact outcome for that child might be different from those of his or her siblings who are the subject of the same court action.

Two surveys were also undertaken as part of the study, one of solicitors (n=96) and one of parents who had a child whose views had been taken as part of court process (n=28). Thirty-six interviews were also conducted with sheriffs, solicitors, parents, children and non-legal practitioners working in services that support children experiencing court ordered contact.⁴⁰

THE NATURE OF THE CASES COMING BEFORE THE COURTS

In the UK Government response to the family justice review of England and Wales it was asserted that that ‘too often, divorcing couples end up arguing over deeply sensitive and emotional issues in the adversarial environment of the courtroom.’⁴¹ However, at least where disputes over children are concerned, divorcing couples are actually in the minority in the cases before the courts. In the ‘Listening to Children’ study only 38% of children’s parents were (or had been) married, while a quarter were unmarried former cohabitants – some of whom had separated before the birth of the child. In total 40% of the children’s fathers had never lived as part of the child’s household at any point since their birth. The significance of the nature of the underlying relationship between the parents is that, for so many, there is no indication they ever functioned in a unified manner (nor that they ever intended to do so).

There was also at least one significant welfare concern raised by at least one parent in the majority of disputes. Domestic abuse was alleged in 49% of the cases; substance abuse in 28% and mental illness in 10%. In total 60% of cases involved allegations of a least one of these three issues. Additionally, it was alleged there had been threats of abduction in respect of 19% of the children while 15% of children had either not been returned to their resident parent on at least one occasion after contact or had been taken by the non-resident from their nursery/school and retained.

Notably, despite the background to the disputes, by and large these were not people who had gone straight to court without attempting or facilitating contact and most children in the court data set (60%) had actually exercised contact with their non-resident parent since the time of separation (or birth). However for two-thirds of *these* children, that contact had then broken down and only 18% were still exercising contact at the time the case came to court. The length of time that contact had been ongoing for the children who had exercised contact was obviously constrained by the length of time since the child was born, with 10% of children being under a year of age and a quarter of children under three years of age. Almost a third of all those exercising contact had done so for between six months and two years prior to the raising of the action, while 27% had exercised between two to four years of contact. Thirteen percent of children had exercised contact for more than four years.

³⁹ Known more usually as ‘SPSS.’

⁴⁰ The data reported in this paper is taken from the analysis of the court data. The full findings and discussion of the methodology used for the questionnaires and interviews are available in K Mackay, *The child’s voice in contact disputes: genuine participation in private law court actions* (Lambert Academic Publishing, 2012).

⁴¹ MoJ, *The Government response to the family justice review: a system with children and families at its heart*. Ministerial Forward (2012), at p 4.

In most instances the reasons for the breakdown in contact were serious, with clear implications for the wellbeing of the child if contact were to continue uninterrupted in the face of the unresolved issue. In particular, contact between the non-resident parent and the child was unlikely to be on-going at the time the case was raised when there were allegations of domestic abuse or child abuse.⁴²

Table 1: Primary alleged reason for the cessation of contact between a child and the non-resident parent, where known (n=156).⁴³

Physical or sexual abuse against a parent	Physical or sexual abuse of the child	Non-physical domestic abuse*	Quality of contact concerns**	Retention of child by non-resident parent	Resistance to demands for increased contact
31% (n=49)	19% (n=30)	15% (n=24)	22% (n=34)	11% (n=18)	1% (n=2)

* 'Non-physical domestic abuse' includes verbal abuse including threats to kill or abduct the child, restrictions of movement, surveillance, controlling access to money.

**'Quality of contact concerns' includes: neglecting the child during contact (such as shutting in a room with the television set all day), the abuse of substances by the non-resident parent during contact or leaving the child with third parties.

It is a sobering and worthwhile exercise to consider in more detail the reasons for resident parents' resistance to contact. Where there had been *no contact at all* between a child and his or her non-resident father since separation (n=76 children living with their mothers), 82% of these women cited serious welfare concerns in respect of the children.⁴⁴ The mothers of thirty-seven of these children stated they had fled the family home with their children to protect themselves from physical abuse at the hands of their husbands or partners, while the mothers of nine children fled verbal intimidation and threats. These 'threats' included threats to abduct the child, threats to kill the mother and threats to kill the child. The mothers of a further eleven children left the family home as they believed that their partner had sexually abused a child, with seven of these children's fathers having been convicted of the sexual abuse of a child. The mothers of five further children left after being advised by social workers that if they continued to live with the fathers of their children, their children would be taken into care (this being verified by letters to the court from the local social work department).

When mothers *had* initially facilitated contact that then broke down (n=98 children living with their mothers), this was often because the mother re-partnering or starting to date (or even merely to go out with friends) could trigger a violent outburst from their father. In one such case a mother reported she had stopped attempting to date as her child's father would telephone and put their daughter on the phone distressed and begging her not to go out. Additionally, the mothers of fifteen of these children who had exercised contact that had then broken down were allegedly subjected to physical or sexual assault or, more commonly, threats of abduction of

⁴² Although 14% of children were exercising contact with their non-resident parent at the time the case came to court where there were allegations of domestic abuse.

⁴³ Of the 299 children in the data set, it could be discerned whether there was contact or not at the time the action was raised for 256 children. Of these 256 children, 206 were not exercising contact at the time the case came to court and the primary alleged reason for the cessation in contact was known for 156 of these (78%).

⁴⁴ In a further 13% it was stated there had been no contact as none had been sought and in 5% of cases less than a month had passed since separation.

the child (as well as actual retention of the child). In one case the father allegedly sent the mother a tomb stone with the name of the child of the action inscribed on it.

There was also a case of suspected sex abuse of the child by the father, two children who were allegedly sexually assaulted by an older child living in the father's household, five children in respect of whom it was alleged their father had physically assaulted them during contact and five children who were allegedly verbally/emotionally abused during contact – such being told by their father that he would kill their mother and/or her partner. There was also a further case in which social workers had advised a mother not to allow contact, and a case in which a mother feared the child's father would take their daughter to Gambia to be circumcised.

These cases account for almost half of the cases where children living with their mothers had contact post-separation but this then broke down.⁴⁵ In the remainder of cases the cause of the breakdown in contact usually concerned the child's lack of enjoyment of contact and wish to have a say in contact arrangements, or was due to the non-resident parent retaining the child after contact.⁴⁶

Where the serious allegations made are an accurate reflection of the circumstances of the child, a resident parent who did not resist contact between their child and the non-resident parent could be said to be failing to protect their child. However, in the context of a child contact dispute it is often assumed the allegations are false and intended to thwart the other parent's contact with their child.

In total 6% of the cases in the court data set involved allegations of the sexual abuse of a child. This is not a surprising figure when put against the figure of the 1% of children who are known to be sexually abused by a parent or carer during their childhood years,⁴⁷ as the uncovering or, of suspicion of, child sex abuse may be the reason for the breakdown in the parental relationship and is more likely to propel the case into a court. Under LASPO, mothers have to have pre-existing evidence of child abuse obtained within the previous 24 months and not just suspicions that it is occurring if they are to access legal aid to raise an action in court.⁴⁸

Women in many of the situations that led to the breakdown of contact need the protection afforded by 'arms length' negotiations conducted on their behalf by a solicitor and may clearly benefit from the court's ability to restrict the actions of an often enraged former partner who may be unwilling to lose control of his former partner and children.

Nine men in the 'Listening to Children' data set also alleged domestic abuse and in three these cases it was alleged this had been perpetrated by the new partner of the child's mother. Only four men alleged the mother of their child had been abusive to them and they were themselves accused of being abusive in the three cases which were defended. Two fathers also alleged the children's mothers had been physically abusive towards their children.

⁴⁵ J Fortin J Hunt and L Scanlan found in their study on adults recollections of child contact that respondents who had been exposed to domestic violence (21% of respondents) usually said the contact had broken down and that it was they that had opted to end or suspend it. In J Fortin J Hunt and L Scanlan, *Taking a longer view of contact: the perspectives of young adults who experience parental separation in their youth* (Sussex Law School, 2012), p 216.

⁴⁶ Often such children had been routinely left in the care of third parties and not their other parent, or the non-resident parent was erratic and unreliable in exercising contact or refused to tell the resident parent where the child would be during contact.

⁴⁷ P Cawson C Wattan S Brooker G Kelly, *Child maltreatment in the UK: a study of the prevalence of child abuse and neglect* (NSPCC, 2000). The percentage of children experiencing sexual harm involving physical contact by others (such as siblings and other children or young people) is 11%.

⁴⁸ The supporting documents that may suffice as evidence are listed the Civil Legal Aid (Procedure) regulations 2012 (SI 2012/3098), s 34.

THE LAW PERTAINING TO THE RESOLUTION OF CHILD CONTACT DISPUTES

In both jurisdictions the substance of the law pertaining to the resolution of those child contact disputes which come before the courts is broadly similar with it generally being assumed children will benefit from ongoing contact with both parents unless welfare concerns (such as abuse) indicates otherwise. However there have long been differences in the *processing* of child contact disputes in England and Wales and in Scotland, which may be relevant to the recent reforms. For, in England and Wales, cases where domestic abuse allegations are raised have been processed differently to other child contact cases for some time, whereas in Scotland the same procedures apply to all cases.

In England and Wales, the relevant law is contained in the Children Act 1989 which stipulates that when a court determines any question in respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration.⁴⁹ When a court in England and Wales is considering whether to make, discharge or vary an order in respect of contact or residence of the child, or an order prohibiting a parent from taking an action in respect of the child,⁵⁰ it has to have regard to what is generally referred to as a 'welfare checklist' of criteria, contained within the Act.⁵¹ Specifically, the court is to have regard to the ascertainable wishes and feelings of the child concerned (considered in the light of the child's age and understanding), as well as to the child's physical, emotional and educational needs; the likely effect on the child of any change in circumstances, the child's age, sex, background and any characteristics of the child which the court considers relevant, as well as any harm which the child has suffered or is at risk of suffering and how capable each of the child's parents is of meeting the child's needs. The court is also instructed not to make an order unless it believes that doing so would be better for the child than making no order at all.⁵²

In Scotland also, the welfare of the child is the paramount consideration of the court when considering making an order that relates to parental responsibilities and rights, with the relevant law being contained within the Children (Scotland) Act 1995.⁵³ There is however no equivalent to the welfare checklist contained within the Children Act 1989; although courts in Scotland are nonetheless under a statutory duty to give children the opportunity to express their views,⁵⁴ and are similarly not to make an order unless they are persuaded that it is better for the child that an order be made, than none be made at all (referred to in Scotland as the no-order or status quo principle).⁵⁵ The reasoning behind this 'minimum intervention principle' in both jurisdictions is to discourage courts from interfering unnecessarily with arrangements reached by parents.⁵⁶

No statutory equivalent to the idea of 'harm' as contained in the checklist of the Children Act 1989 was present in statute in Scotland until the Family Law (Scotland) Act 2006 amended the Children (Scotland) Act 1995 by inserting section 11(7A)-(7E) so that courts must now have regard to the need to protect the child from any abuse or the risk of any abuse.⁵⁷ Prior to this

⁴⁹ Children Act 1989, s 1(1).

⁵⁰ Children Act 1989, s 8.

⁵¹ Children Act 1989, s1(3).

⁵² Children Act 1989, s1(5).

⁵³ Children (Scotland) Act 1995, s11.

⁵⁴ Children (Scotland) Act 1995, s11(7)(b).

⁵⁵ Children (Scotland) Act 1995, s 11 (7)(a).

⁵⁶ The author is grateful to an anonymous reviewer of this article for the observations made on this point.

⁵⁷ Abuse is defined in the Act as including "violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress." It also encompasses "speech" and "presence in a specified area or place." The abuse also need not have been directed towards the child and the court is to consider the ability of a person who has carried out abuse "to care for or to otherwise meet the needs of the child."

amendment the issue of abuse was determined under common law as an aspect of the child's welfare and the view among legal practitioners at the time the provisions were introduced was that they would "add little to the existing case law."⁵⁸

It remains the case that the starting point in the determination of child contact disputes in both jurisdictions is the general assumption that children will benefit from on-going contact with both parents after separation. An example of this assumption in English law can be found in *Re O* where it was stated:

"Where parents of a child are separated and the child is in the day-to-day care of one of them, it is almost always in the interests of the child that he or she should have contact with the other parent. The reason for this scarcely needs spelling out. It is, of course, that the separation of parents involves a loss to the child, and it is desirable that that loss should so far as possible be made good by contact with the non-custodial parent."⁵⁹

The clear assumption is that the child already has a prior subsisting relationship with their non-resident parent as well as that the relationship is of benefit to the child and missed by the child. Although in *Re L, V, M and H*, Lord Thorpe LJ observed that the strength of the assumption would vary depending on the nature of the previous relationship between parent and child.⁶⁰

In Scotland, key dicta in respect of this issue is to be found in the seminal case of *White v White*,⁶¹ in which it was stated it may normally be assumed that the child will benefit from continued contact with the natural parent without there being any requirement on that parent to demonstrate that benefit.⁶² Lord President Rodger expanded on the reasoning for an assumption of contact with both parents by stating:

"the power of that particular assumption can perhaps be gauged by imagining the outcry if a judge were to declare that she would take as her starting point the opposite assumption, that normally a child would not benefit from contact with his absent parent." [at para 15]

Consequently, in both jurisdictions the courts do not start from a position of neutrality when determining a child contact dispute and the onus is on the parent resisting contact to establish that the nature or the pre-existing relationship between the parent and child is such that contact will not be of benefit to the child or that the risks to the child outweigh any benefits.

Differences emerge between the jurisdictions in the processing of family cases however and these have existed for a number of years. Included among these differences is the mandatory referral to a meeting with a mediator, first introduced into England and Wales by the Family Law Act 1996 where parties would require legal aid to raise a court action.⁶³ A key purpose of the meeting with the mediator was to determine if mediation could take place 'without either

⁵⁸ E Clive in Scottish Parliament Paper 401. *Justice 1 Committee 8th Report. Session 2.* (2005). For a full discussion of the impact of the statutory provisions see K Mackay, *The child's voice in contact disputes: genuine participation in private law court actions* (Lambert Academic Publishing, 2012), Ch Five.

⁵⁹ Sir Thomas Bingham in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124 at page 128.

⁶⁰ *Re L, V, M and H* [2001] Fam 260 at para 295. Specifically, he was of the view that the assumption would be strongest when there was a pre-existing relationship between the child and parent and weakest when the child had developed over his or her early years without any knowledge of his or her father and especially if the child had an attachment to an alternative father figure.

⁶¹ *White v White* 2001 S.L.T. 485.

⁶² Previously, it had been stated by Lord Hope of Craighead in *Sanderson v McManus* 1997 S.C. (H.L.) 55 that "the question is whether contact with the parent has something to offer which is likely to be of benefit to the child's welfare."

⁶³ Family Law Act 1996, s 29.

party being influenced by fear of violence or other harm.’⁶⁴ In Scotland however, there has never been any similar requirement for parents to consider mediation prior to the raising of legal proceedings in a court of law. Courts do have the power to refer a case to mediation when an order relating to parental rights and responsibilities is in issue,⁶⁵ however this is rarely utilised, with just 2% of couples being referred to mediation in the ‘Listening to Children’ study.

In England and Wales, the conduct of private law disputes in the context of abuse has been guided by a number of practice directions over recent years.⁶⁶ Where a case is to go to court, Form C1a has been used to bring allegations of domestic abuse or risks of child abduction to the attention of the court. In Scotland, such allegations would be part of the Initial Writ or Defences rather than on a separate form. Further, courts in England and Wales may hold ‘fact finding’ hearings to determine whether allegations of abusive behaviour are substantiated, either as a split hearing or as part of the substantive hearing.⁶⁷ There is no similar hearing in Scottish child contact cases short of the final proof hearing which was only held in 1% of cases in the ‘Listening to Children’ study.⁶⁸ That said, a sheriff may make a finding of fact (or decline to do so) as part of the child welfare hearings convened to determine the issue of contact.⁶⁹

In both jurisdictions background reports may be ordered to provide the court with additional information. These are usually undertaken by the Children and Family Court Advisory Service (CAFCASS) in England and Wales and most usually by solicitors in Scotland.⁷⁰ These reports are likely to be requested where welfare concerns have been raised but in England and Wales the courts have to consider alternative ways of working with the parties such as intervention by CAFCASS, mediation by an external provider, collaborative law or the use of a parenting plan, prior to ordering a court report.⁷¹ There is no similar requirement in Scotland.

There are also differences in the *scope* of the reports undertaken for private law proceedings in the two jurisdictions since, perhaps as a consequence of the existence of the ‘fact finding’ hearing in England and Wales, when the court appoints CAFCASS to undertake reports in *private* law disputes, this is either on matters relating to safety or on some other specific issue and ‘general requests should be avoided.’⁷² This approach has been criticised for ‘causing the service to children to suffer’.⁷³ In Scotland however, reporters are usually appointed in terms of the Matrimonial Proceedings (Children) Act 1958 to ‘investigate and report to the court on all the circumstances of the child and on the proposed arrangements for the care and upbringing of the child.’⁷⁴ The breadth of the investigations a court reporter may undertake in Scotland

⁶⁴ Family Law Act 1996, s 29 (3F).

⁶⁵ Ordinary Court Rules, r 33.22; Rules of Court of Session, r 49.22

⁶⁶ Practice Direction (residence and contact orders: domestic violence and harm) [2009] 12 FCR 223; Practice Direction (the Revised Private Law Programme) [2010] All ER (D) 276 (mar); President’s Guidance in relation to split hearings [2010] 2 FCR 271.

⁶⁷ For commentary on history and effectiveness of these hearings see: R Hunter and A Barnett, *Fact Finding Hearings and the Implementation of the President’s Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* (Family Justice Council Domestic Abuse Committee 2012).

⁶⁸ While proof hearings were set in 14% of cases in the Listening to Children study, they only proceeded in 1% of cases.

⁶⁹ Convened under Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33.20.

⁷⁰ Appointed under the Children Act 1989, s 7 in England and Wales and Matrimonial Proceedings (Children) Act 1958, s 11 in Scotland.

⁷¹ Practice Direction (the Revised Private Law Programme) [2010] All ER (D) 276 (mar), para 5.2.

⁷² Practice Direction (the Revised Private Law Programme) [2010] All ER (D) 276 (mar), Para 5:4.

⁷³ House of Commons Justice Committee, *Operation of the family courts. Sixth report of session 2010-2012*. HC 518-1 (2011), para 188.

⁷⁴ Matrimonial Proceedings (Children) Act 1958, s 11. The same wording is used in the Rules of Court, Act of Sederunt Sheriff Court (Sheriff Court Ordinary Cause Rules), r 33.21.

facilitates a particularly full picture of the circumstances of the child to be gleaned and the ‘Listening to Children’ study found court reports could lead to the uncovering of a history of abuse in cases where none had actually been alleged by a party to the action. Limiting either the number of reports ordered or their scope could leave children at risk of harm.⁷⁵

The ‘Listening to Children’ study found courts in Scotland are significantly more likely to order a court report when abuse is alleged than when it is not, with reports being ordered in 58% of cases where abuse was alleged, compared to 35% where it was not. This is the only difference in the *processing* of domestic abuse cases in the private family law courts of Scotland.⁷⁶ By contrast, in England and Wales, the historical differential processing of cases in which allegations of abuse are made, may underpin the removal of cases from the courts in England and Wales by LASPO except where there is recent documentary evidence of abuse. LASPO also extends a pre-existing diversion to mediation, not present in Scotland.

EVIDENCE OF ABUSE AT THE TIME THE COURT ACTION IS RAISED

The evidence that is now required in England and Wales under LASPO in order that a victim of domestic abuse may qualify for legal aid is stipulated within the Civil Legal Aid (Procedure) Regulations 2012. As amended, LASPO defines domestic violence as:

“any incident, or pattern of incidents, of controlling, coercive or threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.”⁷⁷

Although this definition is inclusive of incidents of controlling or coercive or threatening behaviour, the list of permissible *evidence* of domestic violence does not take account of the non-physical nature of much abuse. A parent is unlikely to be able to provide documentary evidence of controlling behaviour, whereas an investigative report ordered as part of court process *could* provide evidence of this if that report included the taking of statements from a number of individuals. Even when abuse is physical, there are likely to be evidential difficulties for victims as we know only 16% of domestic abuse victims report an incident of domestic violence to the police.⁷⁸

The Regulations lists ten different forms of evidence of domestic violence, one of which ‘must be’ provided in an application for civil legal services in England and Wales.⁷⁹ These are: that there is an unspent conviction for a domestic violence offence; a police caution for domestic violence offence; evidence of relevant criminal proceedings for a domestic violence offence which have not been concluded; a relevant protective injunction; an undertaking; a letter from a person appointed to chair a multi-agency risk assessment conference confirming that the person in question has been referred to the conference as being of high risk of domestic violence (and there is a protection plan in place); a copy of a finding of fact of domestic violence between the parties made in the UK; a letter or report from a health professional confirming s/he has examined the alleged victim and is satisfied they had injuries or a condition consistent with

⁷⁵ The use of court reports is the focus of Scottish Government working group on bar reports at the time of writing as the reports regularly cost £3,000 with obvious implications for legal aid expenditure.

⁷⁶ Although it should be noted that in cases in which abuse was alleged the court ordered that contact should take place in a child contact centre in respect of 38% of the children who were subject to a contact order during the time the case was before the court. By contrast, in cases in which abuse was *not* alleged, the court only ordered that contact should take place in a child contact centre in respect of 13% of the children who were the subject of a contact order during legal process.

⁷⁷ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s12(9) of Sch I, Part I.

⁷⁸ British crime survey 2008-2009, cited in House of Commons Justice Committee *Operation of the family courts: sixth report of session 2010-2012* (2011), para 10.

⁷⁹ Civil Legal Aid (Procedure) Regulations 2012, s33(2)(a).

those of a victim of domestic abuse; a letter from a social services department confirming the party has been assessed as being at risk of domestic violence and finally, a letter or report from a domestic violence support organisation in the UK confirming the party was admitted for a period of twenty four hours or more to a refuge for those experiencing domestic abuse.

Such forms of evidence will only be accepted if the evidence was obtained within the preceding twenty four month period - with the exception of unspent convictions for a domestic violence offence or where there are criminal proceedings for a domestic violence offence which have not concluded.

In the Scottish 'Listening to Children' study, 58% of the 147 mothers who alleged domestic abuse would have (potentially) been able to supply documentary evidence of domestic abuse of the type required under LASPO, while two-thirds of the mothers alleging child sex abuse had evidence of the abuse. However, *crucially*, it was often the investigative powers of the reporters appointed in these cases which resulted in the documentary evidence being made available for the court as these women had fled violence (and by implication their homes and belongings) and were unlikely to have been able to provide such evidence for themselves.

The most common type of evidence listed in the Regulations that was potentially available to mothers in the 'Listening to Children' study related to her residence in a women's aid refuge, as forty mothers were in a refuge at the time the action was raised. Additionally twenty-nine fathers were the subject of criminal proceedings at the time the action was raised and sixteen had previous convictions for violence against the mother of the child of the action. The same numbers were the subject of a civil interdict (injunction) at the time of the action was raised. There was some overlap between these categories so that, for example, a significant number of the fathers of the child/ren who were living in a refuge with their mothers were the subject of criminal proceedings. It is therefore the case that around a quarter of all the mothers who alleged domestic abuse had access to more than one source of documentary evidence at the time their case came to court. However, 42% of women alleging abuse would not have had any of the requisite evidence. Given that the majority of lone mothers lack the resources to pay for a court action, under LASPO, most will find themselves unable to raise a court action. Their children will therefore not benefit from the protective features of court process which include the granting of protective orders, the ordering of investigative welfare reports, the taking of children's views and the unique power of the court to regulate the residence of a child and to limit or remove parental rights.

THE PROTECTIVE CAPACITIES OF COURTS THAT PROMOTE WELFARE

In total, protective orders were granted by the court in cases affecting 23% of children in the 'Listening to Children' study. These included non-molestation orders (which were craved in 11% of cases) and interdicts against removal of the child (which were craved in 18% of cases). There were also a further four cases in which an exclusion order (to prohibit the other parent from entering the matrimonial home) was sought and a further two cases in which non-harassment orders were requested.⁸⁰ There were also four cases in which the primary crave was for delivery of the child (from the other parent) and a further four children in respect of whom the court was asked to either remove the other parent's right to regulate the residence of the child *or* to find and declare that the pursuer was the only person entitled to exercise parental rights and responsibilities in respect of the child. Only courts have the authority to make such orders.

⁸⁰ Matrimonial Homes (Family Protection) (Scotland) Act 1981, s 4 (exclusion orders). Protection from Harassment Act 1997, s 85(2)(b) (Non harassment orders).

It is also the case that only welfare reports that have the authority of the court are able to obtain disclosure of information held by statutory bodies and from medical records in respect of the child. These reports were ordered in respect of 47% of children. Once appointed, solicitors acting as court reporters spoke to each of the parties and gleaned information from a range of individuals such as school or nursery staff, extended family members and neighbours. They contacted the police and social workers and general practitioners and specialist services (such as drug dependency services) and obtained extracts of convictions where these existed, as well as records of police call outs to the family home. Children who were the subject of the dispute were almost always observed with both parents (at home and during contact). Where contact had not taken place for some time or the children were very young, the courts regularly ordered contact to take place child contact centre and the reporter could observe the contact there.⁸¹

It was largely as a result of the investigations undertaken by court reporters that a record of police involvement with the family due to incidents of domestic abuse was present in 70% of the processes in which allegations of abuse had been made. Across the entire data set evidence of the prior involvement of social workers with a quarter of the families also emerged.

Courts were able to promote the welfare of children even in undefended cases that came before them (being 15% of cases) as the court may order reports in cases in which no notice of intention to defend has been lodged.⁸² As a result, significant welfare concerns were often uncovered. In one case the reporter gleaned that the father, who was seeking residential contact of a baby, had convictions for murder (amongst other crimes/offences) and that the baby had been born prematurely to him by a woman who had previously reported domestic violence by him to the police. Such women may be too terrified to enter the court process and the caution exercised by the sheriffs in cases such as this is clearly consistent with promoting the welfare of the children.

An additional crucial role court reporters play when investigating all the circumstances of the child is ascertaining the view of the child on the contact sought by the non-resident parent. In Scotland, children's views can be taken by a number of means in private law disputes but the court reporter is the most utilised with over half the children whose views were taken, having them taken by this means (n=68).⁸³ Other children wrote letters to the court (n=9) or returned the Form F9 (n=25) or spoke to the sheriff (n=3) or a curator *ad litem* (n=15) or had their own solicitors (n=5).⁸⁴ A total of 125 children had their views taken (n=42%).

The views expressed by the children in the 'Listening to Children' study illustrate the impact of exposure to domestically abusive behaviour upon children. The most prevalent view expressed by children whose views are known was that the child did not want to be made to see their non-resident parent. All but two of the children expressing this view, described abusive behaviour perpetrated by that parent.

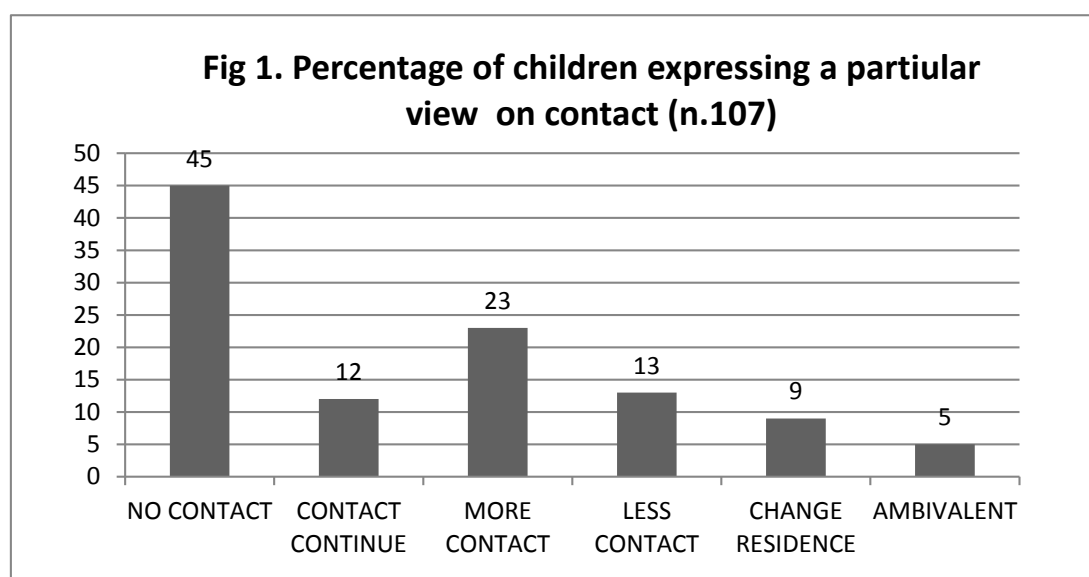
⁸¹ Forty children were the subject of a court order for contact in a child contact centre during proceedings.

⁸² 9% of reports were ordered in undefended cases. In terms of the Act of Sederunt (Sheriff Court Ordinary Cause Rules), r 33.31.

⁸³ Court reporters spoke to just under half of the children in the cases they were assigned in. Three quarters of children whose views were not taken were under six years of age.

⁸⁴ The Form F9 is the form for the intimation of children which informs them of the action between their parents and what the court has been asked to decide. The children are then given an opportunity to write what they have to say about their future on the form or to nominate a third party to put their views to the court for them. Under the Age of Legal Capacity (Scotland) Act 1991, s 2(4A) children in Scotland have the right to instruct a solicitor in any civil matter where they have a general understanding of what it means to do so.

Figure 1 below depicts the views of the 107 children whose views are known.⁸⁵



In the absence of threat or actual harm, children almost always wanted contact and a third of children either wanted the contact they were exercising to continue, or for it to increase.

Included among the children who stated they wished to ‘change residence’ and go to live with their other parent were children who had been retained by their fathers after contact, rather than returned to their mothers. There were twenty-five children in the ‘Listening to Children’ data set who had been retained by their fathers after either contact (n=18) or a period of what their mothers had intended to be temporary residence (n=7). A further 17 mothers had either fled violence without their children, or been ejected from the family home. As a result, almost a quarter of the children in the cases coming before the courts were living with their father alone at the time the action was raised. This is far higher than the national average of 8%.⁸⁶ The court ordered that 11 the 25 children who had been retained by their fathers during contact be returned to their mothers.

As both parents named on a child’s birth certificate retain the right to regulate the residence of their child even when separated, courts clearly have a vital role to play where it is the residence of the child that is in dispute.⁸⁷ However, under LASPO it will only be when a parent *unlawfully* retains a child, that the other parent may access funds to raise a court action. Without court intervention, the numbers of children whose residence is regulated by brute force may increase.

Given that the most common view among the children whose views are taken in child contact cases is that they do not want be made to see their non-resident parent, their views are clearly at odds with the court’s default position that on-going contact will usually be in the best

⁸⁵ The views of 18 of the children who returned Form F9 or letters to the court were marked as “confidential” and were not borrowable.

⁸⁶ Office of National Statistics, *Lone Parents with dependent children*. (2012), p 1. Available at http://www.ons.gov.uk/ons/dcp171780_251303.pdf (last accessed on 03.05.13).

⁸⁷ Since 01.12.2003 unmarried fathers in England and Wales have parental responsibilities in respect of their child if registered on the birth certificate which can only be removed by court order under s4(2A) Children Act 1989 as amended. Since 04.05.2006, unmarried fathers in Scotland have similarly had parental rights and responsibilities if registered on the birth certificate of the child under s3 of the Children (Scotland) Act 1995, as amended.

interests of the child. It is also at odds with that assumption as it underpins the removal of family actions from the courts and into mediation. Rather, these children's views reflect their experiences of being under the control of their particular non-resident parent, as the following extracts from children's letters to the courts illustrate.

"Our dad is very competitive but he takes it too far. He tells us we are fat and makes us go for runs which we hate.... he shouts at us and swears and calls us bastards...I feel sad and powerless that we don't get our say." Boy, aged 13.

"I don't want to go to dad because he shouts and swears. He grabs my collar and he hurts me....He makes us clean his house. When he drinks he falls asleep on the couch." Boy, aged 10.

"Dad says he will throw out my toys and won't let me see my friends. He made me give my birthday money to charity and shouted at me when I cried." Girl, aged 8.

All of the above children spoke of being shouted at and described powerlessness in the face of aggression and control. In one case the child's grandmother had raised an action for contact but it was so her father could see her. Her view of contact was:

"I don't want to see Gran because she made me see my dad who made me do all the chores and if I didn't he hit me. He treats the other children [step siblings] like they are number one and I am invisible. They wouldn't let me phone home and would not let me go home. This makes me really sad." Girl, aged 10.

These children were clearly describing abusive behaviour towards themselves yet only around half their mothers could have provided evidence for the raising of a court action under LASPO. For, just over a quarter of these children were living in a refuge and only one in five had a father who was the subject of criminal proceedings, while 17% had a father who had previous convictions for the assault of their mother. It was the case that 88% of these children's mothers had alleged domestic abuse and there was evidence of police involvement in two thirds of these children's families however, as described previously, neither allegations nor police calls to the family home are sufficient for the raising of a court case in England and Wales under LASPO.

It has to be said however, that although open access to the courts *potentially* enables children who are distressed by contact to be protected, it was nonetheless evident in the 'Listening to Children' study that the outcome of the case depended to a significant degree on the attitudes of the individual reporter appointed to undertake investigations. The court ordered in line with the recommendations of the reporter in all but one of the cases reviewed. Yet, in Scotland at present, there is no requirement for solicitors undertaking this role to have any specialist training in child development (such as attachment theory), nor on the impact of domestic abuse on children, nor on consulting with children. The 'Listening to Children' study therefore found significant variation in the weight different reporters attached to evidence of abuse and to children's negative views on contact, and there is a clear need for the reforms in Scotland to address the training needs of reporters.⁸⁸ This variation resulted in almost a third of children who said they did not want contact being ordered into contact by the court.

Overall however, two-thirds of the children whose views are known had a contact outcome that was broadly consistent with the views they expressed. The most prevalent contact outcome as a result of the court process was that the amount of contact the child/ren had with their non-resident parent increased (48% of all children). For a further 41% of children the pattern of contact in place at the time the case came to court continued. A third of these children had been

⁸⁸ For a full discussion on this point see K Mackay, *The child's voice in contact disputes: genuine participation in private law court actions* (Lambert Academic Publishing, 2012), Ch 8 and Ch 9.

exercising contact and two-thirds had not at the time the action was raised. The residence of a further 11% was changed by the court, with contact also being ordered in half these cases.

When contact was not ordered by the court it is unclear the extent to which it was the child's views or the abusive behaviour that usually underpinned those views that had the greatest impact on the reporter's recommendations. However, the prior involvement of statutory agencies had a clear impact on contact outcomes, as there was evidence of their involvement in 80% of the families of the children who were not exercising contact at the last hearing in the case – illustrating the potential impact of the proactive investigations of most reporters. It was also the case that conditions attached to contact ordered by the court, such as that it be exercised in a child contact centre, sometimes resulted in non-resident parents abandoning their action for contact.⁸⁹

CONCLUSION

Among the key findings of the author's 'Listening to Children' study is the extent to which victims of domestic abuse rely on state funding for raising or defending a family court action – with almost three-quarters of women alleging abuse being in receipt of legal aid.

While it may be argued that some women make false allegations of abuse out of vindictiveness towards a former partner and a desire to cut him out of their children's lives, this is not supported by the extent to which the mothers in the court data set had facilitated contact post-separation, nor by the evidence of abuse that was uncovered once the case was before the court. In particular, police involvement with the families was found in 70% of cases in which a reporter was appointed and allegations of abuse had been made. This is a surprisingly high figure given that most incidents of domestic abuse are not reported to the police.⁹⁰

Just over half of the mothers who alleged domestic abuse in the 'Listening to Children' study could have (potentially) supplied documentary evidence of domestic abuse of a kind acceptable for LASPO at the time of *raising* the court action. For the remainder it was the court action that provided the opportunity for welfare reports which could uncover evidence of abuse and other welfare issues (such as substance addiction) where these existed.

Additionally, the views children expressed within the legal process illustrate that children can be distressed by behaviours that are unlikely to generate the type of evidence required by LASPO – in particular being shouted at, verbally abused, made to do household chores and exposure to heavy drinking. However, at best, the resident parent of just half of the children who stated they did not want to be made to see their non-resident parent in the 'Listening to Children' study would have had evidence sufficient for funding to raise an action under LASPO.

These findings combine to illustrate that the drastic changes to the funding and processing of family actions in England and Wales can be expected to have a negative impact on many parents seeking to protect their child from distressing behaviours they are exposed to in the presence of their other parent. Many parents may find themselves simply unable to protect their children in the wake of LASPO and may face sustained threats and intimidation in the face of an inability to seek protective orders, or the regulation of parental responsibilities and rights by

⁸⁹ In two thirds of the cases in which no order for contact was made by the court, the case was either abandoned by the pursuer or the defender lodged an undefended party motion asking that the case be dismissed.

⁹⁰ This is not to say that false allegations are not made in some cases but overwhelmingly the picture that emerges is of mothers facilitating contact until an incident or accumulation of incidents result in the breakdown of that contact.

court order; while increasing numbers of children may find their residence regulated by brute force.

It is likely that there will be a substantial number of requests that parents may receive legal services as an 'exceptional case' on the basis that their Convention rights under the European Convention on Human Rights might otherwise be breached. However, when abusive behaviour is the reason behind the request for exceptional treatment, it is likely they may face routine rejection for failing to qualify under the specific domestic violence provisions of that same Act.

Public law cases concerning the welfare of children may therefore be expected to increase as parents seek the support of statutory agencies in place of raising a court action or in order they might accrue the evidence to do so; while the police may find themselves having an increasing role intervening in disputes when a non-resident parent fails to return their child to their primary carer or forcibly removes the child from her.

In this article, the nature of the reforms in England and Wales has focused attention on the key protective factors which make access to the courts essential for the protection of the vulnerable among us – most particularly our children. It is imperative that these protective factors are not undermined in the drive to cut costs, but that their significance to the welfare of children is acknowledged and forms the basis for future reforms that build on the existing strengths identified with the Scottish court system.